



COMMONWEALTH OF KENTUCKY

ETHICS COMMITTEE OF THE KENTUCKY JUDICIARY
Room 200, State Capitol
FRANKFORT, KENTUCKY 40601

ANTHONY M. WILHOIT
Court of Appeals

ROGER CRITTENDEN
District Court

JOSEPH H. ECKERT
Circuit Court

B. M. WESTBERRY, CHAIRMAN
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Judicial Ethics Opinion
JE-80

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QUESTION

Should a Circuit Judge disqualify himself or herself from hearing cases involving a Program Cabinet of State Government where the spouse of the judge is an attorney employed by the Program Cabinet involved in the litigation and holds the position of Deputy Commissioner?

FACTS

The Circuit Judge in question sits in the Franklin Circuit Court at Frankfort, Kentucky which is the seat of state government. Much litigation is generated in this Court involving various cabinets of state government including the Natural Resources and Environmental Protection Cabinet. The spouse of the Circuit Judge in question is an attorney employed by the Cabinet for Natural Resources and Environmental Protection and holds the title of Deputy Commissioner. He serves as a legal advisor to the General Counsel and participates, along with others, in policy making decisions of the cabinet.

DISCUSSION

The committee feels the spouse's position and duties with the cabinet elevates his level of responsibility above that of a lawyer practicing cases on behalf of the cabinet. His involvement reaches to making policy decisions which could and more than likely will come before the Circuit Court for interpretation.

The code states that a judge is required to disqualify in all cases in which a relative within the third degree of relationship is an "officer of a party." Canon 3(C)(1)(d). The rule appears to be mandatory. While there

is little authority on the question of whether officials of governmental agencies are "officers", the authority that we find tends to state they are, and disqualification is absolute. Ethics Opinion of the Ethics Advisory Committee of the State of Washington 8401; Cuyahoga County Board of Mental Retardation v. Association of Cuyahoga County Teachers of the Trainable Retarded, 351 N.E.2d 777 (Ohio App. 1975).

Prior to the adoption of the Code the rules were considerably different. Under the old canons if the judge had a relative who was a public officer, so long as the public officer was neither personally or politically interested in the outcome of the litigation, the judge was not required to disqualify. 46 Am. Jur.2d Judges § 151 (1969); 48A C.J.S. Judges § 127 (1981); Hill v. Kesselring, Ky., 220 S.W.2d 858 (1949); Vilardo v. Sacramento County, (Cal. App. 1942) 129 P.2d 165. We feel, however, the code has changed this interpretation.

The code does not define officer, therefore, the Committee must examine closely the duties of the judge's husband to determine whether he is an officer within the meaning of the code. Love v. Duncan, (Ky. 1953) 256 S.W.2d 498; Black v. Sutton, Ky., (1945) 191 S.W.2d 407; 63A Am. Jur.2d Public Officers and Employees § 11-12 (1984); 67 C.J.S. Officers § 7-8 (1978).

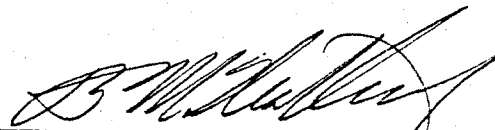
Some Committee members believe the husband's title and position as Deputy Commissioner and the fact that he participates in policy making decisions creates the impression with the general public that he is an officer and as such disqualifies her. Ex Parte Jackson 508 S.2d 235 (1987).

The members of the Committee participating in this decision unanimously agree that the judge should disqualify herself because her husband participates in policy decisions of the cabinet, the validity of which will be before the judge. In such a case, her impartiality could be reasonably questioned and violates the appearance of impropriety. Canons 2 and 3(C).

CONCLUSION

For the foregoing reasons, the Committee concludes that the judge should disqualify herself in all cases involving the Natural Resources and Environmental Protection Cabinet unless there is a waiver by the parties as permitted by Canon 3(D).

Judge Roger Crittenden disqualified himself from any participation in the proceedings relating to this opinion.

A handwritten signature in dark ink, appearing to read "B. M. Westberry", written over a horizontal line.

B. M. Westberry, Esquire
Chairman
Judicial Ethics Committee